No. 77-1589

In the Supreme Court of the United States

OCTOBER TERM, 1977

JOSEPH THOMAS OLIVETI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 567 F. 2d 638.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1978. A petition for rehearing was denied on March 8, 1978. On March 31, 1978, Mr. Justice Powell extended the time to file a petition for a writ of certiorari to and including May 7, 1978. The petition was filed on May 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court erred in admitting co-conspirators' declarations before making a finding that a *prima facie* case of conspiracy had been established.

2. Whether the conduct of Drug Enforcement Administration agents was so outrageous as to bar petitioner's prosecution.

3. Whether proof of an overt act is necessary to sustain a conviction under 21 U.S.C. 963 and whether, in the absence of an overt act requirement, Section 963 violates the First Amendment by proscribing constitutionally protected speech.

4. Whether it was error to permit testimony that petitioner's conversations with Drug Enforcement Administration agents were tape-recorded without requiring the tapes to be heard by the jury.

5. Whether petitioner was denied the effective assistance of counsel because his retained attorney was allegedly considering forming a partnership to practice law with the attorney for petitioner's co-defendant.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiring to import cocaine and marijuana, in violation of 21 U.S.C. 963. He was sentenced to six months' imprisonment and a three-year term of special parole. The court of appeals affirmed (Pet. App. A).

The evidence showed that petitioner conspired with Benton Franklin Thomas, Jacob Cochran, and Gerald Patrick Hemming to smuggle cocaine and marijuana into the United States. DEA undercover agents testified that petitioner's co-defendant Thomas met with them on 16

separate occasions. Thomas repeatedly boasted of his ability to smuggle drugs into the United States, described the nature of his smuggling operation, and offered to smuggle cocaine and marijuana in cooperation with them (Tr. 128-130, 136-139, 170-174, 182-186). After the agents accepted Thomas's offer, Thomas asked them to advance him money so that he could pay certain transportation expenses (Tr. 128-132). Thomas subsequently met with the agents several times to discuss the details of the smuggling operation (Tr. 133-140). At one meeting with DEA agents, Thomas and co-conspirator Cochran proposed selling amphetamine pills to finance the operation. They gave several of the pills to the agents as samples at that time (Tr. 339-340).

Petitioner met with Thomas and Cochran and DEA agents on two occasions to plan the drug importation operation. At the first meeting, petitioner indicated his knowledge of Thomas's and Cochran's agreement to smuggle cocaine and marijuana. After informing the agents that Thomas and Cochran would assist him, petitioner offered to transport the drugs from Colombia to the United States. Petitioner also asked the agents for money to finance the operation (Tr. 343-345). At the second meeting, petitioner reiterated that he, Thomas, and Cochran would smuggle the drugs. He again requested money from the agents to pay expenses and further discussed the details of the transportation (Tr. 107-109). Following these meetings, Thomas and Cochran gave the agents a final breakdown of their expenses (Tr. 115-118, 353). Before the smuggling operation was put into effect, however, petitioner and his co-defendants were arrested and charged with conspiracy.

ARGUMENT

1. Petitioner argues (Pet. 10-14) that the district court should not have admitted any of the co-conspirators' declarations against him before determining from independent evidence that he was a member of the conspiracy.

Contrary to petitioner's contention, it is well settled that there is no need to establish the existence of a conspiracy by independent evidence prior to the point in the trial at which co-conspirators' declarations are admitted. Fed. R. Evid. 104(b). See, *e.g.*, *United States* v. *Stanchich*, 550 F. 2d 1294, 1297-1298 (C.A. 2); *United States* v. *Apollo*, 476 F. 2d 156, 163 (C.A. 5); *United States* v. *Knight*, 416 F. 2d 1181, 1185-1186 (C.A. 9). This long-standing practice of admitting evidence subject to later connection promotes the orderly and logical reception of evidence. Otherwise, witnesses' testimony concerning co-conspirators' statements would be interrupted until the government established independent proof of the conspiracy, thereby leading to unnecessary confusion, inconvenience, and delay. As long as independent evidence of the conspiracy is eventually adduced, a defendant is not prejudiced by the order of proof selected by the prosecution.[1]

In this case, the district court correctly found that independent evidence showed that petitioner was a member of the conspiracy. Petitioner himself stated in the

[1] *United States* v. *Oliva*, 497 F. 2d 130 (C.A. 5), and *Montford* v. *United States*, 200 F. 2d 759 (C.A. 5), on which petitioner relies, provide no support for his position. In those cases, the court held that the co-conspirators' statements were improperly admitted because the government never adduced sufficient independent evidence of the defendant's participation in the conspiracy. Those cases did not deal with issue of the order of proof.

presence of his co-conspirators that he would smuggle cocaine and marijuana into the United States and that his co-conspirators would accompany him in this illegal operation. This evidence was plainly sufficient to justify the admission of the co-conspirators' declarations against him.

Petitioner also argues (Pet. 20-22) that the court's giving a "shorthand" rendition of its instruction concerning the admission of co-conspirators' statements, rather than repeating the instruction in full each time hearsay was introduced, warrants a reversal of his conviction (Pet. 20-21). Yet petitioner did not object to the court's shorthand cautionary instructions (Tr. 114, 131, 133, 164 259, 323, 325, 327, 332, 336, 338, 341, 351), and, in any event, the court gave its detailed cautionary charge no fewer than six times during the trial (Tr. 111, 123, 127, 156, 260, 302) as well as in its final charge to the jury (Tr. 461-462). There was obviously no need for the court to repeat its initial instruction in full each time co-conspirators' declarations were introduced.

2. Petitioner next contends (Pet. 15-17) that the conduct of the DEA agents in offering to supply an airplane and crew to transport drugs and in suggesting the name of a purported foreign supplier of cocaine was so outrageous as to bar petitioner's prosecution. Plainly, it was not. The offers occurred after five months of discussions with the co-conspirators, in the course of which the agents pretended to agree to smuggle drugs in cooperation with the conspirators. Moreover, the offers were never acted upon. As the court of appeals observed (Pet. App. 10), this conduct fell far short of even the conduct that was sustained in *Hampton* v. *United States*, 425 U.S. 484, and *United States* v. *Russell*, 411 U.S. 423.

3. Petitioner next argues that the evidence is insufficient to support his conviction under 21 U.S.C. 963 because the government failed to prove that an overt act was committed in furtherance of the charged conspiracy (Pet. 18-19). As the court of appeals correctly noted, however, it is well established that 21 U.S.C. 963 does not require proof of an overt act (Pet. App. 8). See, *e.g.*, *United States* v. *Umentum*, 547 F. 2d 987, 991 (C.A. 7); *United States* v. *Dreyer*, 533 F. 2d 112, 117 (C.A. 3); *United States* v. *Bermudez*, 526 F. 2d 89, 94 (C.A. 2); *United States* v. *Beasley*, 519 F. 2d 233, 247 (C.A. 5), vacated and remanded on other grounds, 425 U.S. 956; see also *United States* v. *Rodriguez*, 546 F. 2d 302 (C.A. 9).

In any event, the indictment alleged and the government proved the commission of various overt acts in furtherance of the conspiracy (Pet. App. 46-47). The overt acts consisted of meetings among the DEA agents and the conspirators where the conspirators introduced new co-conspirators to the agents and worked out the details of the proposed importation scheme (Tr. 104-122, 132-135, 153-158, 162-166, 264-265, 300-303, 325-354).[2] Additionally, the evidence showed that one of the conspirators had traveled to Honduras to arrange the smuggling scheme (Tr. 314-317, 328-335) and that the conspirators had provided the agents with what they said were amphetamine pills to raise funds for the smuggling

[2]Post-agreement meetings conducted to further the aims of the conspiracy are "overt acts," even though the meetings may consist mainly of discussions of the conspiratorial scheme, and even when the subsequent meetings have not involved the introduction of new members to the conspiracy, as was the case here. See, *e.g.*, *United States* v. *Villarreal*, 546 F. 2d 1145, 1146 (C.A. 5); *United States ex rel. Epton* v. *Nenna*, 446 F. 2d 363, 367 (C.A. 2), certiorari denied, 404 U.S. 948; *United States* v. *Armone*, 363 F. 2d 385, 401 (C.A. 2), certiorari denied, 385 U.S. 957.

effort.[3] Finally, the district court charged the jury that it had to find that an overt act in furtherance of the conspiracy was committed by one of the conspirators before a conviction was authorized (Tr. 460). Under this instruction petitioner received more than he was entitled to under the statute.

The government's proof of various overt acts is also dispositive of petitioner's related claim (Pet. 23) that 21 U.S.C. 963 violates the First Amendment because in the absence of proof of an overt act the statute proscribes constitutionally protected speech. Petitioner's claim is in any event without merit, since conspiracy statutes prohibit agreement, not mere advocacy, and they therefore do not proscribe constitutionally protected speech. *United States* v. *Amidzich*, 396 F. Supp. 1140, 1146-1147 (E.D. Wis.). Cf. *United States ex rel. Epton* v. *Nenna*, 446 F. 2d 363, 367 (C.A. 2); *New York State Broadcasters Association* v. *United States*, 414 F. 2d 990, 997 (C.A. 2), certiorari denied, 396 U.S. 1061.

4. Petitioner further argues (Pet. 27-28) that it was error to allow the jury to hear testimony that conversations between DEA agents and the defendants were tape-recorded without playing the tapes for the jury. But petitioner did not raise this issue below, and it should therefore not be considered by this Court. *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16. In any event, since the tapes were in large part inaudible (Tr. 167), it would have

[3]The fact that neither the Honduran trip nor the pill transaction was charged as an overt act in the indictment is of no significance. In proving an overt act in furtherance of a conspiracy, the government is not limited to the overt acts alleged in the indictment. *United States* v. *Nowak*, 448 F. 2d 134, 140 (C.A. 7); *Reese* v. *United States*, 353 F. 2d 732, 734 (C.A. 5); *Finley* v. *United States*, 271 F. 2d 777 (C.A. 5), certiorari denied, 362 U.S. 979.

been proper for the district court to deny petitioner's request to have the tapes played to the jury even if he had made such a request. *United States* v. *Frazier*, 479 F. 2d 983 (C.A. 2); cf. *United States* v. *Riccobene*, 320 F. Supp. 196 (E.D. Pa.), affirmed, 451 F. 2d 586 (C.A. 3).[4]

5. Finally, petitioner argues (Pet. 29-34) that he was denied his Sixth Amendment right to the effective assistance of counsel because his privately retained counsel did not inform him that, at the time of petitioner's trial, he was considering forming a partnership for the practice of law with the attorney for co-defendant Thomas. Petitioner asserts that he did not learn of the proposed partnership and did not understand its impact until after his appeal to the Fifth Circuit was decided (Pet. 33). But petitioner did not raise this issue below, and none of the facts concerning the formation of the partnership and petitioner's knowledge of it appear in the record. Accordingly, this issue is not appropriate for review.[5]

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[4]Petitioner has not alleged that the tapes would have contradicted the testimony of the agents or otherwise aided his cause.

[5]Even assuming the truth of all the facts petitioner alleges in support of his theory of improper "joint" representation, it is far from clear that the fact that the one defendant's attorney was considering the possibility of forming a law partnership with a co-defendant's attorney would give rise to a likely conflict of interest. Compare *Holloway* v. *Arkansas*, No. 76-5856, decided April 3, 1978.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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